SUPREME COURT, U. S.

FILED

AUG 7 1968

JOHN F. DAVIS, CLERK

No. 227

In the Supreme Court of the United States

OCTOBER TERM, 1968

ALBERT R. AVELLA, JOHN EDWARD GALLUCCI, AND ROBERT TOSCANI, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

ERWIN N. GRISWOLD,
Solicitor General,
FRED M. VINSON, Jr.,
Assistant Attorney General,
BEATRICE ROSENBERG,
KIRBY W. PATTERSON,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 227

ALBERT R. AVELLA, JOHN EDWARD GALLUCCI, AND ROBERT TOSCANI, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a–2a) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on May 27, 1968. The petition for a writ of certiorari was filed on June 24, 1968. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether a truck in petitioners' possession was properly searched without a warrant.

315-938—68

2. Whether petitioners' motion to permit examination of all statements and other tangible evidence in the government file was properly denied.

3. Whether a mistrial should have been granted because the government sought, on re-direct examination, to question an FBI agent concerning his previous knowledge of petitioners, which had been elicited on cross-examination.

4. Whether the cross-examination of petitioner Avella was prejudicial.

STATEMENT

After a jury trial in the United States District Court for the District of New Jersey, petitioners were convicted of possessing goods stolen from an interstate shipment, in violation of 18 U.S.C. 659. Each petitioner was sentenced to two years' imprisonment. The court of appeals affirmed.

The sufficiency of the evidence to support the convictions is not questioned here. The evidence on petitioners' pre-trial motion to suppress showed that at about 10 a.m. on October 14, 1966, the FBI received information from a person who had previously furnished reliable information that products of the Planters Peanut Company, stolen from an interstate truck shipment, would be delivered at 205–209 Passaic Street in Garfield, New Jersey. The informant also stated that the products would be delivered in a truck driven by petitioner Toscani and that they would be received by petitioners Avella and Gallucci (App. 698–699, 730–731).[1] The premises named were

[1] Reference is to the appellants' appendix in the court of appeals.

placed under surveillance. At about 11:55 a.m. that morning, a rented Ford truck driven by Toscani drove up to the premises and was met by Avella and Gallucci. After the three conferred briefly, Toscani backed the truck through a narrow driveway between the described premises, which were used for commercial purposes, and an adjoining building (App. 700). From the other side of Passaic Street, an agent observed the unloading of the truck; he could see the lower part of the men's bodies and observed cartons being placed in the garage area (App. 700, 718).

A few minutes later, when Toscani apparently saw one of the agents, they ceased unloading and started walking down the driveway toward the front of the building. As the agents approached, petitioners hurriedly entered 205–209 Passaic, and were followed by the agents through the building to the rear courtyard. The first agent to reach the scene saw that the rear doors of the truck were partially open and that there were cartons of Planters products inside the truck. Petitioners were then placed under arrest. A search of the truck and of the garage yielded numerous cartons of Planters products, shipped from Suffolk, Virginia (App. 700–702, 721, 722, 727, 736).

ARGUMENT

1. In the circumstances shown, immediate arrest and search of the truck without a warrant were clearly appropriate. Petitioners' conduct corroborated the information which the agents had received from a reliable informant and provided ample reason to believe that the stolen goods would be found in the

truck, as the informant had advised. *Draper* v. *United States,* 358 U.S. 307; *Carroll* v. *United States,* 267 U.S. 132; *United States* v. *Konigsberg,* 336 F. 2d 844, 847–848 (C.A. 3).

2. At the conclusion of the government's evidence, petitioners Avella and Toscani moved for "an order directing the prosecutor to permit defense counsel to review all statements, testimony, review all pictures and tangible evidence that may be in its file, which has not been used thus far", citing *Brady* v. *Maryland,* 373 U.S. 83.[2] No representation was made that any evidence material to guilt or punishment had been withheld, and the United States Attorney stated that there was nothing in the file which was favorable to petitioners (App. 328–331). The motion was plainly a "fishing expedition" and was properly denied. See *North American Rockwell Corp.* v. *N.L.R.B.,* 389 F. 2d 866, 873–874 (C.A. 10).

3. On cross-examination of FBI agent Harvey, the following exchange took place (App. 55):

> Q. Before the day in question—which I believe was October 14th of last year—you had never seen the defendants before, had you, any of the three?
>
> A. Yes, sir; I had.
>
> Q. You had seen them before?
>
> A. Yes, sir.
>
> Q. And you knew which one was which by name before you arrived there?
>
> A. Yes, sir.

---

[2] Petitioners do not contend that they were denied any materials to which they were entitled under 18 U.S.C. 3500.

On redirect examination, the prosecutor referred to that testimony, and asked Harvey, "Tell us about that." The court sustained an objection to the question, but refused to grant a mistrial (App. 117–120). Inasmuch as the objection was sustained, there was no occasion for a mistrial. If any inference of petitioners' former misconduct was suggested, it was the result of the incautious cross-examination on their behalf.

4. Petitioner Avella testified on cross-examination that he had been convicted of a crime, once, in 1961. Upon further questioning, he amplified this to state that he had been convicted of maintaining a gambling resort, maintaining a gambling business, and gambling, but that he believed that this was considered as one offense. The United States Attorney introduced in evidence certified copies of Avella's convictions for maintaining a gambling resort on May 22, 1962; for possession of lottery slips on March 27 and 28, 1962; and for bookmaking, also on March 27 and 28, 1962. Avella, through his counsel, stated that there was no objection to the introduction of these exhibits (App. 363–365). When asked whether he was the bouncer, rather than the manager at the lounge where he worked (as he had testified on direct examination), Avella answered that he would keep order, but he was not of sufficient size to evict troublemakers. Avella was then asked whether he had been a prize fighter, and he replied that he had had a few amateur fights and two professional fights (App. 365–367).[3] This questioning,

[3] Objection to this question, on the ground of remoteness, was overruled (App. 367).

while lacking in any great significance, was proper clarification of petitioner's direct testimony. Contrary to petitioners' contention, Avella was not characterized opprobriously by the government at this point or at any other point in the trial.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.
FRED M. VINSON, JR.,
Assistant Attorney General.
BEATRICE ROSENBERG,
KIRBY W. PATTERSON,
Attorneys.

AUGUST 1968.

U.S. GOVERNMENT PRINTING OFFICE: 1968